SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 194

LAWRENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION, STERLING SUGARS SALES CORP., AND STERLING SUGARS, INC., A DELAWARE CORPORATION,

Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

CARL J. BATTER,
Counsel for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Your petitioners, Lawrence M. Williams, as Liquidator of Sterling Sugars, Inc., formerly a Louisiana Corporation, Sterling Sugars Sales Corp., and Sterling Sugars, Inc., a Delaware Corporation, respectfully pray for a writ of certiorari to the Court of Claims of the United States to review the judgment of that Court entered in the above consolidated causes No. 45050 and 45654, on February 1, 1943.

The petitioners' motion for a new trial was overruled on May 3, 1943.

Opinion Below.

The opinion of the Court of Claims of the United States is reported at 48 F. Supp. 647 (R. 18). The petitioners'

motion for a new trial was overruled on May 3, 1943, and is reported at R. 23.

Jurisdiction.

The judgment of the Court of Claims of the United States now sought to be reviewed was entered on February 1, 1943. Petitioners' seasonable motion for a new trial was overruled May 3, 1943 (R. 23). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 U. S. C. A. Section 288).

Nature of the Controversy.

This is a proceeding to recover floor stocks taxes paid by the petitioners under the Agricultural Adjustment Act in the amount of $81,784.59 (R. 10), as the result of the invalidation of said Act by this Court in *United States* v. *Butler* (297 U. S. 1).

The Revenue Act of 1936 in Title VII (49 Stat. 1747) made provision for the refund of such taxes but required that the claimant establish, to the extent pertinent hereto, that he bore the burden of such tax, and had not passed it on to the vendee either separately or included within the price of the commodity.

Of the total tax paid by the petitioners, that is $81,784.59, the sum of $3,101.14 was paid on cotton bags (R. 18), and the Court of Claims awarded judgment to the petitioners in that sum. That amount is not in controversy, but the balance of $78,682.45 is. The said balance of $78,682.45 (R. 10) was paid as floor stocks tax on direct-consumption sugar and the Court of Claims decided that the petitioners passed the tax on to its vendees.

The Court of Claims in reaching its decision rejected the finding of fact of the Commissioner who reported on the case, finding that the petitioners realized on the sale of the

sugar $27,110.98 less than the cost of production and the tax (R. 25); even though the record contains a stipulation of Counsel (R. 23) and an exhibit (Pet. Ex. 11, R. 24) supporting the finding of the Commissioner. The opinion of the Court is silent as to the reason for this rejection. We believe the rejected finding to be a material issue to the extent of $27,110.98, of tax burden borne.

The opinion and conclusions of law of the Court below with regard to the entire burden of the tax on sugar are not sustained by the findings of evidentiary or primary facts; but appear instead to be premised on matters not included in the findings of fact that the petitioners believe were incorrectly construed. We believe that the findings of fact made by the Court below show that the judgment in point of law is not sustainable.

Statute Involved.

The pertinent statute is Section 902 of the Revenue Act of 1936 (49 Stat. 1747) and is as follows:

> "No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> "(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such

Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

"(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

The Questions Presented.

1. Does a stipulation that the petitioners on the sale of the tax-paid sugar realized a sum $27,110.98 less than the cost of production plus the tax create a material issue requiring a finding of fact to that effect and a judgment in that amount?

2. Do the findings of fact, evidentiary and primary, made by the Court below with respect to sugar require an ultimate finding of fact that the petitioners bore the entire burden of the tax, and *a fortiori* that the failure to grant a judgment for the petitioners is not sustainable in law?

Reasons for Granting the Writ.

1. The Court below—by rejecting the finding of fact made by the Commissioner who reported on the case, the said finding being supported by a stipulation of Counsel, showing that the petitioners realized on the sale of the sugar $27,110.98 less than the cost of production plus the tax—failed to make a finding of fact on a material issue. The

failure to make such a finding, for reasons undisclosed, is reviewable by this Court (28 U. S. C. A. 288(b) as amended May 22, 1939).

2. The rejection of the aforesaid finding of fact, for reasons undisclosed, is in conflict with the decision of the same Court in *Insular Sugar Refining Corporation* v. *United States* (49 F. Supp. 319), wherein the said Court held that such a finding of fact was material, stating at page 323:

> "Unless it shows at least that *it has not recovered its costs plus tax,* it has not sufficiently carried the burden of showing that it itself paid the tax and did not pass it on to its customers." (Italics supplied).

3. The rejection of the aforesaid finding of fact as a material issue is also in conflict with *United States* v. *Will T. Cheek* (126 F. (2d) 1) and *Colonial Milling Co.* v. *Commissioner of Internal Revenue* (132 F. (2d) 505) with regard to which the Court of Claims states in its opinion in *Insular Sugar Refining Corporation* v. *United States* (*supra*) at page 323:

> "It falls short of a showing that the plaintiff did not recover its cost plus tax, which the Circuit Court of Appeals for the Sixth Circuit has held was sufficient to show it had borne the burden.
>
> * * * * * * *
>
> "We are of opinion that, in line with the above cited discussions of the Circuit Court of Appeals for the Sixth Circuit in the Cheek and Colonial Milling Company cases, plaintiff must go this far, at least."

4. The petitioners are informed that Insular Sugar Refining Corporation is filing a petition for a writ of certiorari based on the same principle of fact and law and it is respectfully urged that the failure to grant a writ in the

case at bar would—if the Insular Sugar Refining Corporation is successful—result in a gross denial of justice.

5. The petitioners operate in the Mississippi and Ohio River Valleys territory, and the findings of fact made by the Court below establish the same factors controlling the sale price of the sugar as existed in the case of *United States* v. *Will T. Cheek* (*supra*), who also operated in that territory, and wherein the Sixth Circuit Court of Appeals held the taxpayer bore the entire burden of the floor stocks tax on sugar, stating that:

> "Where the evidence contradicts any real relationship between tax and price increases, that is, indicates that the floor stocks tax was never, in any sense, a factor in determining the sales price of the various articles, the burden of the statute has been adequately met."

A holding to the contrary in the case at bar, even though the findings of fact establish similar conditions in the same competitive territory, creates a conflict between Courts that calls for an exercise of this Court's power of supervision.

6. The findings of fact made by the Court below with regard to the sale of sugar show conclusively that the petitioners sold their sugar in a highly competitive market, where the factors and elements affecting the market price were many and varied, and unaffected by the tax, and such findings show that the denial of an ultimate finding of fact favorable to the petitioners is not sustainable in law (See *United States* v. *Esnault-Pelterie*, 303 U. S. 26).

7. The findings of fact made by the Court below show that in a short period immediately preceding the tax imposing date the price of sugar declined 50 cents per hundred pounds (R. 17), and that on the tax date the price advanced 55 cents per hundred pounds (R. 18). The tax amounted to 53½ cents per hundred pounds (R. 18). It is evident

therefore that a decline in anticipation of the tax, and a restoration of price on the tax effective date to the previous level, does not result in a tax shift and meets the approximation urged by the government in *Anniston Mfg. Co.* v. *Davis* (301 U. S. 337). In the Brief for Respondent (The United States) in that case at page 138, footnote 71, the following appears:

> "Generally, a simple comparison of the sales price before and after the imposition of the tax should be sufficient. The taxes were imposed on goods held ready for sale, and change or lack of change in the price on these goods would ordinarily be conclusive as to tax shifting or absorption."

That principle is sound and should be applied providing allowance is made for the price decline in the period preceding the tax date because "there was a natural effort to move stocks of sugar into the hands of retailers and customers" (R. 17).

WHEREFORE, your petitioners pray that a writ of certiorari issue to the Court of Claims of the United States, commanding said Court to send to this Court a certified transcript of the record in that Court consisting of the pleadings, findings of fact, conclusions of law, judgment and opinion of the Court, and such other parts of the record as have been applied for by the petitioner under Rule 99(b) of said Court, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Claims with respect to the floor stocks tax on sugar be reversed, and that the petitioner be granted such other and further relief as may seem proper.

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